the applicant had derogated him to a minority shareholder in the company. These are not insubstantial losses to the applicant of his rights in the company.

In *Re Australian Continental Resources Ltd.*, it has been said that the exercise of discretion provided in section 366(3) (Australian), implies a consideration of the relative gains or losses of the parties involved. Prejudice is not the criterion, justice is, and that justice may require that the prejudice to one party if the order were made be balanced against the respective prejudice to other parties if the order were not made.

It would appear in this case that the absence of a proper notice to the applicant both in regard to the general meeting as well as the forfeiture of the purported new shares allotted to it, has substantially prejudiced its position in the company as a majority shareholder. This has caused injustice to the applicant. In the event I am of the view that on the balance of respective prejudice, a validating order should not be made and I should grant the application sought above, in terms with costs.

Application allowed.

Solicitors: *Skrine & Co.; Ng Ek Teong & Partners.*

ABDUL RAHIM v. ABDUL HAMEED & ANOR.

[O.C.J. (Yusoff Mohamed J.) September 11, 1982]

[Johore Bahru – Originating Summons No. 101 of 1981]

Islamic Law – Will – Disposal of estate – Delay in vesting of estate – Rule of perpetuity

This was an application to declare invalid a provision of a Will by a deceased Muslim, Rahiman Sahib s/o Oosainsa Rowther. By Clause 7 of his Will the deceased provided:

"I declare and direct that twenty-one (21) years after the death of the last survivor of my children my Trustees are to wind up my said business and to sell call in and convert into cash every other property real and personal estate of whatsoever nature and wheresoever situate and to divide the proceeds of such sale calling in and conversion into nine (9) shares and to appropriate such shares as follows:–"

Held: (1) in Islamic Law, a testator has power to dispose of not more than one-third of his estate and the residue descends in fixed proportions unless the heirs consented;

(2) a testator cannot delay the vesting of his estate in his heirs;

(3) The rule of perpetuity is not applicable in relation to disposition of property by Muslims in the State of Johore, but clause 7 of the Will in question could not be valid as it infringed the provisions of Islamic Law.

Cases referred to:

(1) *Estate of Rahiman Sahib s/o Oosainsa Rowther* [1983] 1 M.L.J. ccxiii.

(2) *Shaik Abdul Latif* v. *Shaik Elias Bux* (1915) 1 F.M.S. LR. 204.

(3) *Saeda* v. *Hj. Abdul Rahman* (1918) 1 F.M.S.L.R. 352.

(4) *Koh Cheng Seah* v. *Syed Hassan bin Ahmad Al-Attas & Anor.* (1930) 1 M.C. 180.

CIVIL SUIT.

Elyas Majeed for the applicant

Cur. Adv. Vult.

Yusoff Mohamed J.: This is an application to declare invalid a provision of a Will of a deceased Muslim, Rahiman Sahib s/o Oosainsa Rowther dated July 10, 1939 and a Codicil dated June 18 1947 annexed, relating to disposition of his properties.

The applicant is one of the executors and trustees of the deceased's estate. The remaining two executors, Abdul Hameed and Abdul Majeed have consented to this application in writing and have renounced their rights and titles to this Probate. The Probate was granted by Singapore High Court in August, 1951 and has been resealed in the Supreme Court (High Court) at Johore Bahru on September 30, 1953.

The deceased was a Muslim of Sunite Sect belonging to the School of Hanafi. His will devised and bequeathed the whole of his properties consisting of various pieces of land in Malaya and two businesses, one at Johore Bahru and another at Kota Tinggi, Johore. Clause 7 of the Will provides that:–

"I declare and direct that twenty-one (21) years after the death of the last survivor of my children my Trustees are to wind up my said business and to sell call in and convert into cash every other property real and personal estate of whatsoever nature and wheresoever situate and to divide the proceeds of such sale calling in and conversion into nine (9) shares and to appropriate such shares as follows:–"

and clause 3 of the Codicil states:–

"... for the reason stated in clause 2 Supra I hereby substitute "Seven (7) shares" in the place of "nine (9) shares" appearing in the eighth line of clause 7 (seven) of my said Will; and revoke and delete the whole of sub-clause 7(i) of my said Will."

The applicant contends that this provision of the Will and Codicil infringes the Muslim law in purporting to dispose of more than one-third of the deceased's estate; in delaying the vesting of his estate; and also offending the rule against perpetuity.

Upon resealing of the Probate, section 52 of the Probate and Administration Act, Act 97, provides that it has like cause and effect and has the same operation in Malaysia as if it were a grant made by the High Court in Malaysia. It follows that the local court has jurisdiction to construe and decide the validity of the Will as if it was admitted to Probate in Malaysia.

Now, in respect of the disposal of various lands, the deceased's capacity to devise immovable property is governed by *lex situs* (See *Dicey's* Conflict of Laws, 8th Edition on page 521). This means, the Malaysian domestic law. Being a Muslim, the deceased's testamatary capacity in Malaysia is regulated by Muslim law. The Wills Ordinance 1959 does not apply to persons professing the Muslim religion – section 2(iii) of the Ordinance.

As regards movable property in respect of the deceased's two businesses, the validity of the Will of movables depends in general upon the law of the deceased's domicile at the date of his death, (see *Halbury's* Laws of England, 3rd Edition, Vol. 39 para. 1281). This means that the law governing the disposition of the two businesses is the Singapore Law.

A foreign law when administered by the Courts in Malaysia may be proved as a fact by the parties. In a Singapore case, *Estate of Rahimah Sahib s/o Oosainsa Rowther*(1), Mr. Justice T.S. Sinnathuray similarly rejected a deed of settlement of properties by a person professing the Muslim religion which is inconsistent with Muslim law by reason of infringement of the provisions of the law. In that event, it would appear that Muslim Law in fact, also governs the disposition of the deceased's two businesses in Singapore.

In Muslim law, a testator has power to dispose of not more than one-third of his estate and the residue descends in fixed proportions unless the heirs consented. (See *Shaik Abdul Latif* v. *Shaik Elias Bux*(2)).

Clause 7 of the Will directs that:–

".... my Trustees are to wind up my said business and to sell call in and convert into cash every other property real and personal estate of whatsoever nature and wheresoever situate and to divide the proceeds of such sale calling in and conversion into nine (9) shares ..."

This provision clearly shows that the deceased attempted to dispose of all his properties by his Will. This contravenes his power of disposal exceeding the legal one-third of his properties. It cannot therefore be valid.

Clause 7 of the Will also directs that:–

".... twenty-one (21) years after the death of the last survivor of my children my Trustees are to wind up my said business and to sell ..."

By this clause, the deceased seemed to direct the vesting of his estates in his heirs be deferred to 21 years after the demise of his last surviving children Again under the Muslim law, a testator cannot delay the vesting of his estates, in his heirs. In *Saeda* v. *Hj. Abdul Rahman*(3) it was held that a direction in the Will of a Muslim instructing the executors to deal with his estate for 10 years and then distribute it is invalid. On this ground, this part of the clause 7 also becomes invalid.

As regards the disposition in clause 7 allegedly offending the perpetuity rule, I would simply say that the principle of devising a property against the rule of perpetuity is not applicable in relation to disposition of property by Muslims in the State of Johore. See *Koh Cheng Seah* v. *Syed Hassan bin Ahmad Al-Attas & Anor.*(4)

In this event, clause 7 of the Will cannot be valid as infringing the provisions of Muslim Law and I would give judgment in terms of this application.

Application allowed.

Solicitors: *Elyas Majeed & Co.*

T.P.C. v. A.B.U. & ANOR.

[A.C.J. (Edgar Joseph Jr. J.) January 25 & February 23, 1983.

[Penang – Civil Appeal No. 1 of 1983]

Family Law – Adoption – Adoption order made by Sessions Court – Whether appeal lies – Whether appeal should be heard in chambers – Revision – Whether applicant ordinarily resident in West Malaysia – Whether a non-relative can apply for an adoption order – Whether consent given or dispensed with – Adoption Rules 1955, r.12 – Adoption Act, 1952, ss. 4, 5, 10, 22 & 25 – Courts of Judicature Act, 1964, ss. 33 & 35.